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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SERVICE EMPLOYEES INTERNATIONAL
UNION, Local 790,

Plaintiff,

v.

JOSEPH NORELLI, Regional Director of
National Labor Relations Board, Region 20,
et al.,

Defendants.

NATIONAL LABOR
RELATIONS BOARD'S
MOTION TO DISMISS
COMPLAINT

No. 07-cv-02766-PJH

Date: June 27, 2007

Time: 9:00 a.m.

Judge: Hon. Phyllis J. Hamilton

Courtroom: #3, 17th Floor

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INTRODUCTION

Defendants Joseph Norelli, Regional Director for Region 20 of the National Labor Relations Board and the individual Members of the National Labor Relations Board (collectively, “the Board”) respectfully submit this Motion to Dismiss the Complaint filed by Plaintiff Service Employees International Union, Local 790 (“the Union” or “SEIU Local 790”)(Docket No. 1). Accompanying the instant Motion, is a Stipulation to Shorten Time, in order that the Board’s Motion to Dismiss may be heard and decided together with the Union’s Motion for Preliminary Injunction (Docket No. 2). As demonstrated below, this Court lacks subject matter jurisdiction to review or enjoin the Board’s exercise of its discretion pursuant to Section 9(e)(1) of the National Labor Relations Act (“NLRA” or “the Act”), 29 U.S.C. § 159(e)(1) (1998), to conduct an election for employees to consider deauthorizing a union-security agreement. This case is no exception to the general rule barring judicial review of NLRA representation proceedings because the Union cannot show, as it must, that the Board violated a clear and mandatory provision of the NLRA. Accordingly, the Complaint should be dismissed. See Boire v. Greyhound Corp., 376 U.S. 473, 476-77, 481 (1964); Leedom v. Kyne, 358 U.S. 184, 190 (1958).¹

RELEVANT STATUTORY PROVISIONS

A “union-security” agreement is permitted under the first proviso to Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1998). This statutory provision generally allows employers and unions to enter into agreements requiring employees in a bargaining unit to obtain and retain “membership” in the union beginning on or after the thirtieth day following entry on duty. Such

¹ This argument also is presented in the Board’s Response to Plaintiff’s Request for Order to Show Cause and in Opposition to Preliminary Injunction (“Board’s Response”) (Docket No. 14). For the Court’s convenience, it is repeated here.

union “membership” requires only the payment of initiation fees and periodic dues. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). Significantly, Section 8(a)(3) also provides that this permission to enter into union-security agreements is revoked if, following an election conducted pursuant to Section 9(e)(1) of the NLRA, 29 U.S.C. § 159(e)(1) (1998), the Board certifies that a majority of the unit of employees voted to rescind the authority to make such an agreement. Section 9(e)(1) in turn provides:

Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

As set forth below, the instant case concerns the Board’s exercise of discretion to conduct a “deauthorization” election pursuant to this provision.

FACTUAL BACKGROUND

In 2005, the Union and Covenant Aviation Security, LLC (“the Employer”) entered into a collective-bargaining relationship for employees working at the San Francisco Airport. More specifically, on September 30, 2005, a “card check” conducted by a panel of neutrals determined that a majority of the employees of the Employer had designated the Union as their representative for collective bargaining (Verified Complaint for Declaratory and Injunctive Relief (“Complaint”)(Docket No. 1) ¶ 12). Accordingly, the Employer recognized the Union as the bargaining representative (Complaint ¶ 13).² After negotiations, the Union and the Employer

² A “card check” is a voluntary process by which an employer agrees to recognize a union based upon the majority of its employees signing “authorization cards.” “Authorization cards” are signed and dated by the employees, and explicitly authorize the union to represent the signer in collective bargaining. If an employer agrees to such a process, a union can lawfully gain

1 reached tentative agreement on the terms of a collective-bargaining agreement, including a
2 provision for union-security (Exh. 2 to Complaint at 1-2). The Union disclosed those proposed
3 terms to employees on December 28, 2005, and shortly thereafter, employees voted to ratify the
4 agreement (Exh. 2 to Complaint at 1-2). The Union signed the contract on January 12, 2006, and
5 the Employer signed it the next day. By its terms, the contract is effective from January 1, 2006,
6 until December 31, 2008. (Exh. 1 to Complaint at 2.) However, under the NLRA, a union-
7 security clause cannot be made retroactive. See Teamsters Local 25 (Tech Weld Corp.),
8 220 N.L.R.B. 76, 77 (1975). Thus, that term did not take effect until the Employer signed the
9 contract on January 13, 2006 (Exh. 1 to Complaint at 2).

11 Two days before the collective-bargaining agreement was fully executed, employee
12 Stephen J. Burke, Jr. filed with Region 20 of the Board, pursuant to Section 9(e)(1) of the Act, a
13 petition to rescind the authorization of the Union and Employer to make a union-security
14 agreement (Board Case No. 20-UD-445). (Complaint ¶ 17.)

15 On March 23, 2006, the Regional Director for Region 20 issued an order dismissing the
16 deauthorization petition, because both the filing of the actual petition and the petitioner's
17 securing of the required employee signatures demonstrating the thirty percent "showing of
18 interest" pre-dated the effective date of the union-security agreement (Exh. 1 to Complaint at 2).³

19 The Region's investigation disclosed that almost all of the signatures were gathered prior to the
20
21 recognition without a formal NLRB election. See NLRB v. Gissel Packing Co., 395 U.S. 575,
22 595-600 (1969).

23 ³ The "showing of interest" in this case was the submission of employee signatures to the
24 Regional Director in support of the deauthorization petition. Under Board procedure, after such
25 signatures are submitted, the Region investigates the signatures' authenticity and relevance. See
Board's Rules and Regulations § 102.85, 29 C.F.R. § 102.85 (1961); NLRB Casehandling
Manual Part Two-Representation Proceedings, §11506.5 (available at
<http://www.nlr.gov/publications/>).

1 contract ratification vote, and all of them pre-dated the execution of the contract on January 13,
2 2006. (Id.) In the Regional Director's view, under Section 9(e)(1), the showing of interest in
3 favor of deauthorization had to be secured from the employees in the context of an existing,
4 rather than a prospective, contract containing a union-security clause. Significantly, as to the
5 separate premature filing of the actual petition, the Regional Director noted that such deficiency,
6 standing alone, could easily be remedied by filing a second timely petition. (Exh. 1 to Complaint
7 at 2-3.)

8
9 Petitioner Stephen Burke filed a Request for Review of the Regional Director's decision
10 with the Board. The Petitioner argued that the Act contains no restrictions relating to the timing
11 of the signatures supporting the requisite showing of interest and that, as a matter of policy,
12 employees should not have to wait until after a contract's execution to begin the lengthy
13 deauthorization process. (Exh. 2 to Complaint at 1.)

14 On March 30, 2007, the Board (Chairman Battista and Member Kirsanow, Member
15 Walsh dissenting) issued its Decision on Review and Order, reinstating the deauthorization
16 petition and remanding the case to the Regional Director for further appropriate action.
17 (Covenant Aviation Security, LLC, 349 NLRB No. 67, p. 1 (March 30, 2007)(Exh. 2 to
18 Complaint)). The Board found that the timing of the employee signatures supporting the
19 showing of interest did not render the deauthorization petition invalid. The Board reasoned that
20 "[r]equiring the Petitioner to have waited until after a contract containing a union-security
21 provision came into effect before obtaining signatures . . . impermissibly delayed the effectuation
22 of employees' statutory right to rescind the effect of a union-security clause." (Exh. 2 to
23 Complaint at 2.) Although the Board agreed with the Regional Director that the deauthorization
24 petition should have been filed only after the union-security provision became effective, the
25

1 Board also noted that the Regional Director found that such infirmity could be remedied by
2 refileing the petition and that no party requested review of this issue. (Exh. 2 to Complaint at 1
3 n.1, 2-3.)

4 Subsequently, on April 6, 2007, the petitioner filed a new deauthorization petition with
5 Region 20 of the Board, Board Case No. 20-UD-447, seeking an election to rescind the current
6 union-security agreement. (Board Exh. 1 to Board's Response.)⁴ On May 1, 2007, the Regional
7 Director issued and served on the parties an Order to Show Cause regarding conducting an
8 election by mail, also enclosing the new deauthorization petition, which had been amended to
9 reflect the proper local union. The amended petition was served on all parties, including the
10 Union (Board Exhs. 2 and 3 to Board's Response). The Union responded to the Order to Show
11 Cause on May 8, alleging that the Board proceeding was unlawful and in excess of the Board's
12 authority (Board Exh. 4 to Board's Response). The next day, the Regional Director issued a
13 Direction of Election upon this new petition, ordering that a deauthorization election be held by
14 mail, with ballots to be mailed to employees on June 4, 2007 (Board Exh. 5 to Board's
15 Response). Subsequently, the parties were advised that the Transportation Security
16 Administration had raised concerns, delaying the mailing of ballots for the election. However,
17 these concerns were resolved, and the Board issued a new Direction of Election on June 1, 2007,
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19
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22
23 ⁴ Pursuant to Federal Rule of Evidence 201, the Board requests that this Court take judicial
24 notice of the exhibits filed both with this Motion and with the Board's Response. The exhibits
25 are copies of documents from the administrative record of the Board proceedings in this case,
and thus are matters in the public record. See Transmission Agency of Northern California v.
Sierra Pacific Power Co., 295 F.3d 918, 924 n.3 (9th Cir. 2002). Moreover, this Court may take
such notice of these documents without converting the Board's Motion to Dismiss into a motion
for summary judgment. See Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

1 stating that the Region would mail the ballots to employees on June 22, 2007 and count the
 2 received ballots on July 9, 2007. (See attached Board Exh. 6.)⁵

3 Meanwhile, on May 25, 2007, the Union filed the instant Complaint for Declaratory and
 4 Injunctive Relief (Docket No. 1) against the Regional Director and the Members of the Board,
 5 along with a Request for an Order to Show Cause Why Injunctive Relief Should Not Issue
 6 (Docket No. 6), and a Motion seeking to have this Court enjoin the deauthorization election
 7 (Docket No. 2). On May 31, 2007, the Board filed its Response to the Request for an Order to
 8 Show Cause and its Opposition to the motion for injunctive relief (Docket No. 14). On June 1,
 9 2007, District Judge Hamilton issued an Order to Show Cause setting hearing on the motion for
 10 injunctive relief on June 27, 2007 (Docket No. 18). The Board respectfully submits that this case
 11 should be dismissed because review of the Board's proceeding is precluded by well-established
 12 precedent that district courts lack subject matter jurisdiction over such Board proceedings.
 13

14 **ARGUMENT**

15 **THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW THE** 16 **BOARD'S EXERCISE OF DISCRETION TO CONDUCT A DEAUTHORIZATION** 17 **ELECTION**

18 The jurisdiction of federal district courts is limited, extending only to those subjects over
 19 which Congress has granted jurisdiction by statute. Insurance Corp. of Ireland, Ltd. v.
 20 Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982). Unless a grant of jurisdiction
 21 over a particular case affirmatively appears, a court is presumed to lack jurisdiction. NTEU v.
 22 FLRA, 112 F.3d 402, 404 (9th Cir. 1997). As shown below, Congress intended to withhold from
 23

24 ⁵ Under the NLRA, for most employees there is no possible change to the union-security
 25 agreement from the deauthorization proceeding until after the Board resolves any objections filed
 by the parties to the conduct of the election and certifies the election results. See Albert Van
Luit & Co., 234 N.L.R.B. 1087, 1087-88 (1978).

the district courts the power to review representation proceedings, including deauthorization elections, conducted by the Board under Section 9 of the NLRA, 29 U.S.C. § 159 (1998).

A. Board Representation Proceedings Are Not Subject to Direct Judicial Review

The Board is vested with primary (if not exclusive) jurisdiction over representation issues arising under Section 9 of the Act, 29 U.S.C. § 159 (1998). See United Ass’n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 342 v. Valley Engineers, 975 F.2d 611, 613 (9th Cir. 1992); Minn-Dak Farmers Coop., Employees Org. v. Minn-Dak Farmers Coop., 3 F.3d 1199, 1201 (8th Cir. 1993); Bishop v. NLRB, 502 F.2d 1024, 1027 (5th Cir. 1974).

It is well settled that such representation cases are not subject to district court review or direct appellate review. See Boire v. Greyhound Corp., 376 U.S. 473, 476-77, 481 (1964); NLRB v. IBEW, 308 U.S. 413, 414-15 (1940); American Fed’n of Labor v. NLRB, 308 U.S. 401, 409, 411 (1940); Bishop, 502 F.2d at 1027; Local Union No. 714, Int’l Bhd. of Teamsters v. Madden, 343 F.2d 497, 499 (7th Cir. 1965) (precluding union’s claims for district court review of a Section 9(e)(1) deauthorization determination by the Board). This is so because proceedings under Section 9 are nonadversarial in nature and do not result in the issuance of “final orders” subject to judicial review under Sections 10(e) and (f) the NLRA, 29 U.S.C. § 160 (e) and (f) (1998). American Fed’n of Labor, 308 U.S. at 409; UFCW, Local 400 v. NLRB, 694 F.2d 276, 278 (D.C. Cir. 1982) (per curiam); Bishop, 502 F.2d at 1027; Herald Co. v. Vincent, 392 F.2d 354, 356 (2d Cir. 1968). As the Fifth Circuit has explained:

Nowhere in the statutory scheme does Congress mention district court review of NLRB orders in representation cases, and there is a reason for that profound silence. The underlying purpose of the Act is to maintain industrial peace, [citation omitted] and to allow employers and unions to rush into federal district court at will to prevent or nullify certification elections would encourage dilatory tactics by dissatisfied parties and lead to industrial unrest. [citation omitted]

1 Such a rule would not only cause the federal courts to set the dockets of the
2 NLRB, but time-consuming review in such cases would strike a blow at the
3 foundations of our finely-tuned system of collective bargaining. For these
4 reasons, Congress has determined that the NLRB, and not the courts, is to be the
5 umpire in representation disputes.

6 Bishop, 502 F.2d at 1027.

7 Instead, the NLRA provides limited indirect appellate court review of representation
8 determinations. Such review is provided if and when those determinations serve as the
9 underlying predicate for a final order subsequently issued in a related unfair labor practice
10 proceeding. 29 U.S.C. § 160(e), (f) (1998); see Boire, 376 U.S. at 476-77; American Fed'n of
11 Labor, 308 U.S. at 409.

12 The Supreme Court has recognized that Congress may so withhold jurisdiction from the
13 federal courts “in the exact degrees and character which to Congress may seem proper for the
14 public good,” Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (quotation omitted), and may
15 prescribe an administrative remedy to the exclusion of a judicial one. See Switchmen’s Union of
16 N. Am. v. NMB, 320 U.S. 297, 301 (1943). As to the NLRA, the same 1947 Congress that first
17 enacted the Section 9(e) union-security deauthorization procedure (see infra, p. 13), considered
18 and ultimately rejected granting direct judicial review of Section 9 proceedings. See H.R. 3020,
19 80th Cong., 1st Sess. at 34-36, 42-43 (1947), I. Leg. Hist. LMRA 64-66, 72-73; H.R. Rep. No.
20 510, 80th Cong., 1st Sess. at 56-57 (1947), I. Leg. Hist. LMRA 560-61. The Supreme Court in
21 American Fed’n of Labor recognized that the NLRA’s scheme may well fail to provide judicial
22 review for parties affected by a Board representation proceeding. 308 U.S. at 411-12.
23 Nevertheless, the Court expressly noted that any problems posed by this scheme should be raised
24 before Congress and not the courts. Id. at 411.

The Union's attempt to obtain review here impermissibly seeks to bypass this judicially-recognized Congressional intent. See Bays v. Miller, 524 F.2d 631, 633 (9th Cir. 1975); Chicago Truck Drivers v. NLRB, 599 F.2d 816, 818 (7th Cir. 1979).⁶ For the reasons set forth below, moreover, this matter does not fit within the narrow exceptions to the rule of non-reviewability.

B. This Case Does Not Fall Within Any Exception to the Prohibition of District Court Review of Board Representation Proceedings

1. The Leedom Exception to Nonreviewability is Exceedingly Narrow

The Supreme Court has recognized a very narrow exception to the general rule of nonreviewability of Board representation determinations. In Leedom v. Kyne, 358 U.S. 184 (1958), the Board directed an election in what it conceded was a mixed bargaining unit of professional and non-professional employees, without first having "a majority of such professional employees vote for inclusion in such unit," as was expressly required by Section 9(b)(1) of the NLRA, 29 U.S.C. § 159(b)(1) (1998). The Board did not contest that it had acted in excess of its statutory authority; it only argued that, in any event, the district court lacked jurisdiction to entertain the suit. Leedom, 358 U.S. at 187.

The Supreme Court there ruled that an exception to the rule of no district court jurisdiction arises where the

suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather [the suit] is one

⁶ Although the Union relied on a general jurisdictional statute, 28 U.S.C. § 1337(a) (Complaint ¶10), that statute is qualified by the more specific jurisdictional limitation contained in the NLRA. See Whitney Nat. Bank v. Bank of New Orleans, 379 U.S. 411, 422 (1965); NLRB v. California Horse Racing Board, 940 F.2d 536, 540 n.3 (9th Cir. 1991) ("CHRB"). Section 1337 does not provide jurisdiction where, as here, the applicable regulatory statute precludes it. Board of Trustees of Memorial Hospital of Fremont County v. NLRB, 523 F.2d 845, 846 (10th Cir. 1975). Thus, Section 1337 will provide the necessary jurisdiction only if Leedom v. Kyne, as discussed below, is found applicable. See Leedom v. Kyne, 358 U.S. 184, 188 (1958).

1 to strike down an order of the Board made in excess of its delegated
2 powers and contrary to a specific prohibition in the Act.

3 Id. at 188. The Court concluded that, since the professional employee provision of Section
4 9(b)(1) imposed a “clear and mandatory” statutory obligation on the Board, 358 U.S. at 188, the
5 district court had jurisdiction to set aside the Board’s exercise of a power that had been
6 specifically withheld from it by Congress. Id. at 189.

7 The Supreme Court subsequently clarified that the Leedom exception to nonreviewability
8 is extremely narrow. In Boire v. Greyhound, 376 U.S. 473 (1964), the Court refused to find
9 district court jurisdiction to review the Board’s joint employer determination made in a
10 representation proceeding. In so finding, the Supreme Court explained that

11 [t]he [Leedom] exception is a narrow one, not to be extended to permit
12 plenary district court review of Board orders in certification proceedings
13 whenever it can be said that an erroneous assessment of the particular facts
14 before the Board has led it to a conclusion which does not comport with
the law.

15 Id. at 481; see also Teamsters, Local 690 v. NLRB, 375 F.2d 966, 976 (9th Cir. 1967)(Leedom
16 applies only in “extraordinary circumstance”); CHRB, 940 F.2d at 540 (review of non-final
17 Board orders permitted only in “narrowest” of exceptions); Madden, 343 F.2d at 500 (no district
18 court jurisdiction where Section 9(e)(1) deauthorization determination by the Board did not
19 violate “clear and mandatory provision” of the NLRA); Bishop, 502 F.2d at 1030.⁷

20
21
22 ⁷ Two other very narrow exceptions to the rule of no review are clearly inapplicable in this case.
23 Here there is no issue “particularly high in the scale of our national interest because of [its]
24 international complexion,” McCulloch v. Sociedad Nacional de Marineros de Honduras,
25 372 U.S. 10, 17 (1963), nor a clear and strong showing of a violation of constitutional rights,
Teamsters, Local 690 v. NLRB, 375 F.2d 966, 976 (9th Cir. 1967)(potential exception noted in
dicta).

Consistent with Boire, the courts have refused to extend their jurisdictional reach to review the Board's representation determinations alleged to have resulted in an error of law, where the Board did not act in violation of a specific statutory command. See Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 496 (D.C. Cir. 1980) (quoting Chicago Truck Drivers v. NLRB, 599 F.2d 816, 819 (7th Cir. 1979)). Similarly, jurisdiction does not exist for consideration of alleged arbitrary agency action or an abuse of discretion. See Eisinger v. Federal Labor Relations Authority, 218 F.3d 1097, 1103 n.5 (9th Cir. 2000); Bays, 524 F.2d at 633; Physicians Nat'l House Staff Ass'n, 642 F.2d at 496 (quoting Local 130, Int'l Union of Electrical, Radio and Machine Workers v. McCulloch, 345 F.2d 90, 95 (D.C. Cir. 1965)).

Accordingly, "jurisdiction is not conferred on the district courts to consider 'the wisdom of a particular Board policy'" when there is a "disagreement with the Board on a matter of policy or statutory interpretation." Cihacek v. NLRB, 464 F. Supp. 940, 943 (D. Neb. 1979)(quoting National Maritime Union v. NLRB, 375 F. Supp. 421, 434 (E.D. Pa.), aff'd, 506 F.2d 1052 (3d Cir. 1974)). Rather, district court jurisdiction can only exist where the Board has violated a clear and mandatory provision of the NLRA.⁸

2. There Is No Jurisdiction Under *Leedom* Because The Board Here Did Not Violate Any Clear and Mandatory Statutory Provision

In this case, the Union cannot show that the Board violated a clear and mandatory requirement of the Act based upon the timing of the employee petition that was considered by the Board or the timing of the solicitation of employee support. Section 9(e)(1) provides that

⁸ Contrary to the Union's assertion (see Plaintiff's Memorandum of Points and Authorities (Docket No. 3)("Plaintiff's Memorandum") at 2), the availability of an alternative statutory review procedure would separately bar direct district court review under Leedom. See Board of Governors of the Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 43 (1991). In any event, where as here, there is no violation of a clear and mandatory statutory provision, the jurisdictional inquiry ends. See Bays, 524 F.2d at 632-33.

1 upon the filing of a petition by “30 per centum or more of the employees in a bargaining unit
 2 covered by an agreement between their employer and labor organization made pursuant to
 3 section 8(a)(3)” alleging a desire that authority to make a union-security agreement be rescinded,
 4 the Board “shall take a secret ballot of the employees in such unit and certify the results thereof
 5 to such labor organization and to the employer.” 29 U.S.C. § 159(e)(1) (1998). Although the
 6 Union has failed to state this fact in its papers, the Board’s Regional Director is proceeding on a
 7 second authorization petition filed after the effective date of the union-security agreement.
 8 Moreover, contrary to the Union’s argument, the statute places no explicit time limitation upon
 9 when the signatures of the thirty percent of employees must be gathered for such a petition. In
 10 other words, Section 9(e)(1) does not state in clear and mandatory terms that the showing of
 11 interest signatures must be gathered only after a union-security provision goes into effect.
 12

13 The Board here reasonably found that the language of Section 9(e)(1) is “unclear” on this
 14 point and “does not squarely answer the question presented by this case.” The Board explained:

15 Although it is clear from the statutory language that, when filed, a deauthorization
 16 petition must be supported by at least 30 percent of employees “covered by” a
 17 contract containing a union-security provision, Section 9(e)(1) is devoid of language
 18 as to when the showing of interest must be gathered. The employees in the instant
 19 case are “covered by an agreement” containing a union-security clause, and 30
 percent of the employees so covered have supported a petition to get rid of that
 clause. The fact that the 30 percent expressed their desire prior to the coverage does
 not clearly invalidate their desire.

20 . . .

21 It is possible either that Congress did not contemplate the question of whether the
 22 signatures supporting a showing of interest in a deauthorization petition may
 23 predate an effective contract containing a union-security clause, or that Congress
 24 did consider the question but left it to the Board to regulate. Either way, the fact
 of the matter is that the statutory language is inconclusive, and thus it falls to the
 Board as the agency charged with administering the Act to fill in the statutory
 gap. In doing so, we are guided by the Act itself, its legislative history, and
 applicable policy considerations.

25 (Exh. 2 to Complaint at 2).

1 As the Board noted, in 1947, the Act was amended to add a requirement, designated as
2 Section 9(e)(1), that employees first had to vote to authorize a union to make a union-security
3 agreement with their employer before the union could do so. The 1947 amendments also added
4 a deauthorization procedure, then set out at Section 9(e)(2). (Exh. 2 to Complaint at 3); see
5 United States Code, Congressional and Administrative Service, 80th Congress, First Session,
6 1947, Congressional Comments at pp. 1156-1157. Four years later, the Act was amended again
7 to remove the affirmative authorization requirement at Section 9(e)(1), reword the
8 deauthorization provision at 9(e)(2), and designate that section as the new Section 9(e)(1). The
9 Board explained:
10

11 Significantly, in enacting the 1951 amendments, Congress did not express a
12 preference for union-security arrangements. Neither did it choose to return to the
13 pre-1947 status, under which there was no Board-mandated deauthorization
14 process and the issue of rescinding a union-security provision was left to private
15 parties to handle. Rather, Congress sought to eliminate what it viewed as the
16 administrative inefficiencies occasioned by former 9(e)(1)'s authorization
17 requirement, while at the same time preserving the right of employees to
18 deauthorize an unwanted union-security arrangement.

19 (Exh. 2 to Complaint at 3). Although finding this legislative history "inconclusive" regarding
20 any requirement for the timing of securing employee support, the Board reasonably viewed the
21 history as underscoring "Congress' intent to safeguard the right of employees to deauthorize
22 union security." Id.

23 Moreover, contrary to the Union's argument (Plaintiff's Memorandum at 15), the Board's
24 refusal to invalidate the showing of interest in this case is consistent with its precedent
25 construing the requirements of Section 9(e)(1). In Great Atlantic & Pacific Tea Co.,
100 N.L.R.B. 1494 (1952), the Board rejected a union's contention that a deauthorization vote
should be prospective only, i.e., that an existing union-security agreement must remain effective
for the remainder of a contract's term regardless of election result. The Board there found that

1 Congress did not aim to postpone the employees' will regarding union security. Id. at 1495.
2 "[O]nly by holding that an affirmative deauthorization vote immediately relieves employees of
3 the obligations imposed by an existing union-security agreement" can the Board "give effect to
4 the basic congressional objective . . . of not imposing a union-security agreement upon an
5 unwilling majority." Id. at 1497. The Board majority here also noted Andor Co., 119 N.L.R.B.
6 925 (1957), where, in refusing to dismiss a deauthorization petition, the Board relied upon
7 Congress's intent that the 1951 amendments retain employees' "safety valve" to escape
8 undesired union-security obligations. Id. at 928. Taken together, Great Atlantic & Pacific Tea,
9 Andor, and this case, show a consistent construction of Section 9(e)(1) to protect employees'
10 ability to choose whether to rescind authorization for a union-security agreement. The Board
11 here explained, "in the absence of more specific guidance in either the language of the statute or
12 the legislative history, we consider, as a matter of policy, what resolution of the issue at hand
13 best effectuates Congress' purpose of protecting employee free choice," and found such purpose
14 "best effectuated by processing the instant petition." (Exh. 2 to Complaint at 3).

15
16 There is no merit to the Union's argument (Plaintiff's Memorandum at 13–15) that the
17 pending deauthorization election is contrary to Congress's 1951 elimination of the authorization
18 election, and to the Board's observation in Great Atlantic & Pacific Tea that Congress thereby
19 intended for unions to have presumptive authority to enter into union-security arrangements.
20 Here, the Union obviously has already entered into a union-security agreement that is currently
21 effective. No election was required for that to occur. The election soon to take place will be one
22 where the employees will be voting on whether to escape the agreement, and is premised upon a
23 petition filed on April 6, 2007, well after the union-security provision took effect.
24
25

1 In such circumstances, the Board found that it did not make sense to require the Petitioner
2 to wait for a union-security clause to be in effect prior to gathering the required showing of
3 employee interest. The Union had been recognized as the collective-bargaining representative,
4 and the Petitioner “reasonably believed that a union-security provision was imminent. [W]aiting
5 for the parties to execute the contract [to collect the signatures] serves to needlessly - and, from
6 the perspective of many employees, arbitrarily – delay the employees’ right to be relieved of a
7 union-security provision should the majority so will.” (Exh. 2 to Complaint at 4-5.) The Board
8 further found that the employee signatures here, while pre-dating the contract, nonetheless
9 demonstrated the employees’ substantial desire to vote on the question of union security.
10

11 The Board also reasonably found unconvincing the Regional Director’s finding that only
12 post-contract signatures can be permitted because employees may change their mind about
13 deauthorization once they know what benefits have been negotiated by the Union. As the Board
14 noted, the employees’ signing statements made clear that they knew the union-security
15 agreement was only “proposed.” (Exh. 2 to Complaint at 5.) “To presume that employees
16 cannot make an informed choice regarding the idea of a union-security clause before a contract
17 becomes effective robs employees of the ability to express the position that they do not desire a
18 union-security clause in any event.” Id. Even assuming that the contract might affect
19 employees’ views on union security, the actual deauthorization vote here will only be held after a
20 collective-bargaining agreement became effective, so any ultimate impact of the overall
21 agreement will be reflected in the deauthorization vote. Id. at 5. In short, the Board’s decision
22 falls well within the broad confines of its Section 9 authority. See NLRB v. Best Products Co.,
23 Inc., 765 F.2d 903, 908 (9th Cir. 1985) (“[t]he Board has wide discretion to determine
24 representation matters and questions arising during election proceedings”); NLRB v. Berryfast,
25

1 Inc., 741 F.2d 1161, 1163 (9th Cir. 1984); see also NLRB v. A.J. Tower Co., 329 U.S. 324, 330
2 (1946).

3 The difference of opinion between the Board majority and dissenting Member Walsh
4 demonstrates that Section 9(e)(1) is hardly a clear and mandatory provision as to this point, and
5 that reasonable minds differ as to its proper interpretation. Member Walsh argued that the “plain
6 meaning” of Section 9(e)(1) requires that “the showing of interest for a deauthorization petition
7 must be gathered at a time when the employees are actually subject to a union-security
8 provision.” (Exh. 2 to Complaint at 6). He considered the majority’s interpretation
9 “unreasonable” because he found “nothing . . . in the text or context of the provision which
10 suggests that employees only need to be covered by a union-security provision at the time the
11 petition is filed.” Id. at 7. However, the Board majority noted that Member Walsh’s “plain
12 meaning” conclusion focused only on a part of the language of Section 9(e)(1) , while the
13 majority examined the section as a whole, including the introductory clause referring to the filing
14 of a petition with the Board. “Bringing that clause into the analysis,” the majority found “that
15 the statutory language is unclear as to whether the showing of interest in support of that petition
16 may be gathered in advance of an agreement containing a union-security clause.” Id. at 2.
17 Underscoring this lack of statutory clarity is the fact that both the majority and dissent cited the
18 statute’s legislative history and to policy concerns favoring their respective conclusions.
19

20 The Seventh Circuit’s decision in Teamsters v. Madden, 343 F.2d at 500, further supports
21 the conclusion that Section 9(e)(1) is not clear and mandatory as to the collection of employee
22 signatures. There, like here, a union asserted that the Board’s interpretation of Section 9(e)(1)
23 was incorrect. However, unlike here, the Teamsters in Madden argued that Section 9(e)(1)
24 granted employees the right to revoke the union’s authority only as to future union-security
25

1 provisions, and not to revoke current union-security arrangements (i.e., that Great Atlantic &
2 Pacific Tea was wrong). Contrary to the Union's contention here (see Plaintiff's Memorandum
3 at 9), the Madden court rejected this assertion and found that the district court had no subject
4 matter jurisdiction because the Board's interpretation of Section 9(e)(1) was not contrary to a
5 clear and mandatory provision. 343 F.2d at 500. The Court here, like in Madden, should dismiss
6 the Union's complaint, as it seeks to enjoin the Board's permissible exercise of discretion.

7
8 In short, this disagreement over the proper interpretation of Section 9(e)(1) provides no
9 basis for subject matter jurisdiction in this case. See Nat'l Maritime Union, 375 F. Supp. at 434.
10 As explained by the Ninth Circuit in Teamsters, Local 690, 375 F.2d at 971 (quoting
11 International Ass'n of Tool Craftsmen v. Leedom, 276 F.2d 514, 516 (D.C. Cir. 1960)):

12 We need not decide whether we would sustain the Board's view if the question
13 were presented to us in an appeal under the judicial review provisions of [Section]
14 10 of the Act. . . . We need only decide, as we do, that the statutory language
15 itself and the legislative history sufficiently support its position to eliminate the
16 essential requirement for invoking the District Court's equity jurisdiction, namely,
17 a showing that the Board violated a 'clear and mandatory' statutory
18 prohibition (citations omitted)

19 Accordingly, as set forth above, any disagreement by the Union or this Court with the
20 Board's interpretation of Section 9(e)(1) does not create the requisite jurisdiction here.

21 CONCLUSION

22 For the foregoing reasons, the Board respectfully requests that the Union's Complaint be
23
24
25

1 dismissed, with prejudice.

2 Respectfully submitted,

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